APPEAL NO. 94397
FILED MAY 13, 1997

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On March 3, 1994, a contested case hearing (CCH) was held in Harlingen, Texas, with presiding as hearing officer. The sole issue submitted for resolution was: "whether (Employer) was Claimant's employer at the time of his injury on (date of injury)." The hearing officer determined that the appellant, claimant herein, was not an employee of the employer.

Claimant's appeal contends that "the Workers Compensation Statute, as amended . . . is unconstitutional . . ." and that in the alternative the hearing officer's determinations are against the great weight and preponderance of the evidence. Respondent, carrier herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision and order of the hearing officer are affirmed.

We find the hearing officer's discussion of the evidence to be a fair and accurate recitation of the testimony and adopt it for purposes of this decision. By way of background, claimant worked as a cement finisher on a crew that normally worked for Wayne Walker (WW). In early 1993, employer entered into an arrangement with WW which was intended to provide employer with an instant concrete crew. Under this arrangement WW would furnish a concrete crew to employer on certain projects and since WW did not have substantial resources, the work crew was carried on employer's payroll and under employer's workers' compensation coverage. Some problems developed on the project in August 1993 when WW's crew left some work unfinished and while between projects claimant and others filed for unemployment compensation. Subsequently, (HS), employer's project manager, testified that he told WW that the employer no longer wanted WW's crew on its payroll and they could not work for employer until they signed termination notices. HS testified he told WW that they could not work under the old arrangement and that WW could bid on the next job, the San Benito job, as an independent contractor. It is undisputed that WW did submit such a proposal, that the proposal required WW to provide workers' compensation and other insurance coverage and that the employer declined to accept the proposal, which was dated September 22, 1993 (all dates are 1993), as being too expensive.

It is undisputed that WW had gone to the San Benito site and spoken with (JM), the job superintendent on the San Benito job, whose duty it was to get bids, hire subcontractors and generally oversee the work site and monitor progress. JM testified

that WW approached him wanting to bid as a subcontractor for the concrete work. JM testified he told WW that WW's crew could not work as in the past and that WW would have to get insurance. JM further testified he met with WW's crew, told them that they were to be WW's employees and had them sign termination notices. Although the termination notice claimant is alleged to have signed is not in evidence, claimant agreed he had signed a paper prior to beginning work on September 22nd. JM testified he allowed WW and his crew to begin work under an oral agreement that WW was working as a subcontractor and that there was no written agreement, as WW's proposal had been rejected.

JM testified all the tools were provided by WW who told his crew how to do the job. Claimant testified that WW furnished most of the tools but that a crane used on the job belonged to the employer. On September 23rd, after being on the job one and a half days, claimant was injured when a beam fell from the crane and hit claimant on the left leg. There is some dispute regarding the extent of supervision JM exercised over claimant. Claimant testified that JM would come out of his trailer, ask how things were going and would sometimes give claimant a "little plan," (drawing or diagram) for laying out the job. It is undisputed that JM was not well versed in concrete work and that WW was the concrete work expert. JM testified that he only gave general directions and monitored the work schedule. WW testified that he believed his arrangement with the employer to be the same as it had been on the Conroe job. WW testified his proposal was not rejected until after claimant had been injured and that he and his crew had continued work under the same arrangement as in past jobs. WW testified he submitted his payroll to the employer several days after the injury to claimant but the employer did not pay so he and his crew left the job site.

The hearing officer made the following determinations which claimant disputes:

FINDINGS OF FACT

6.[WW] performed as an independent contractor on the San Benito project beginning on September 22, 1993, under an oral contract with Employer.

8.[WW] was not an employee of Employer, and had neither the express nor implied authority to hire employees for Employer for the San Benito project in September 1993.

9.Employer did not furnish tools used by Claimant on the San Benito project in September 1993.

10.Employer did not have the right to hire or fire Claimant on the San Benito project in September 1993.

11.Employer was not obligated to pay Claimant's wages and did not carry Claimant on social security or income tax withholding rolls on (date of injury).

12.Supervision performed by [JM] over Claimant on the San Benito project in September 1993 was limited to general oversight to see that work was done in accordance with the plans and performance schedule.

13.Supervision of the details of Claimant's work performance was performed by [WW] on the San Benito project in September 1993.

14.Employer did not control the details of Claimant's work performance nor did it have the right to control such details on (date of injury).

Claimant, first of all, challenges the hearing officer's determinations as being unconstitutional pursuant to Texas Workers' Compensation Commission v. Garcia, 862 S.W.2d 61 (Tex. App.-San Antonio 1993, writ pending). On this point we would only note the question of the constitutionality of the 1989 Act is presently before the Supreme Court of Texas. Since administrative agencies have no power to determine the constitutionality of statutes, we decline to address the constitutional question raised for the first time on appeal. *See* Texas State Board of Pharmacy v. Walgreen Texas Co., 520 S.W.2d 845 (Tex. Civ. App.-Austin 1975, writ ref'd n.r.e.). *See also* Texas Workers' Compensation Commission Appeal No. 92094, decided April 27, 1992; Texas Workers' Compensation Commission Appeal No. 94214, decided April 6, 1994.

Regarding the challenged determinations, claimant merely recites his interpretations of the facts as showing the findings are against the great weight and preponderance of the evidence. Among other things, claimant alleges he was ". . . at least a borrowed employee for [employer]." The Appeals Panel on occasion has cited Texas cases that stand for the doctrine that an employee of a general employer may become the borrowed servant of another, and that this is a question of fact. Sparger v. Worley Hospital, Inc., 547 S.W.2d 582 (Tex. 1977). We would further note that the borrowed servant doctrine protects the employer who had the right of control over the manner and details of the employee's work from common-law liability. Carr v. Carroll, 646 S.W.2d 561, 563 (Tex. App.-Dallas 1982, writ ref'd n.r.e.). To determine whether or not an injured worker has become a borrowed servant, the question is who has the right to control the activities of the servant. Goodnight v. Zurich Insurance Co., 416 S.W.2d

626 (Tex. Civ. App.-Dallas 1967, writ ref'd n.r.e.). Although claimant argues that JM had the right "to say what people could not be on any of [employer's] job sites . . . ," and that JM ". . . oversaw the work being constructed . . ." the hearing officer could, and did, find that JM's supervision was limited to general oversight to see that work was done in accordance with the plans and performance schedule. The hearing officer found, and is supported by the evidence, that supervision of the details of claimant's work were performed by WW who, as opposed to JM, was the concrete expert.

As noted above, the question of who has the right of control is a factual determination. Texas Workers' Compensation Commission Appeal No. 92039, decided March 20, 1992. Where, as here, there is no contract or agreement which addresses this subject, the right to control the work may be established by circumstantial evidence of the actual facts surrounding the employment. *See* Texas Workers' Compensation Commission Appeal No. 931102, decided January 13, 1994. Relevant facts to consider are who had the right to hire and fire; who paid the wages and collected various taxes; who furnished the tools used on the job and who controlled the details of the employment. No one of these factors, however, is necessarily controlling. *See* U.S. Fidelity and Guaranty Company v. Goodson, 568 S.W.2d 443 (Tex. Civ. App.-Texarkana 1978, writ ref'd n.r.e.). Clearly, WW hired claimant and it was arguable whether employer could have fired him from the San Benito job. Although the employer apparently furnished a crane, it appears that hand tools were supplied by WW. As far as the concrete work was concerned, JM readily admitted he had no expertise in that area and WW was the expert. The hearing officer found, based on the testimony and evidence, that JM only exercised general supervision and did not control details of claimant's work.

Sections 406.121 through 406.146 deal with independent contractors and small construction subcontractors. We note that since WW's proposal was rejected and the crew proceeded pursuant to an oral agreement on the San Benito project, there was no written agreement and therefore the provisions of Sections 406.122(b), 406.123 and 406.144 are not applicable. Nor was there any testimony or evidence from the parties, nor comment by the hearing officer, on any of the statutory provisions. Consequently, we are unable to determine any statutory applicability.

It has also been held that an employee seeking workers' compensation benefits has the burden of establishing an employer-employee relationship out of which the alleged compensable injury arose. *See* Texas Workers' Compensation Commission Appeal No. 92035, decided March 12, 1992; Texas Workers' Compensation

Commission Appeal No. 94358, decided May 11, 1994. The hearing officer apparently determined that claimant had not sustained that burden.

Upon review of the record, we cannot say that the hearing officer's determinations were so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Consequently, we hereby affirm the hearing officer's decision and order.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge